

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL
CONSUMER PROTECTION DIVISION

In the Matter of:

AG File No. 200002052

DOUBLECLICK, INC.

doing business as:

www.doubleclick.net
www.NetDeals.com
www.IAF.net

Respondent.

NOTICE OF INTENDED ACTION

To: **DOUBLECLICK, INC.**
450 West 33rd Street
16th Floor
New York, NY 10001

Attention **Kevin O'Connor**
Chairman and Chief Executive Officer

JENNIFER M. GRANHOLM, Attorney General of the State of Michigan, pursuant to the provisions of the Michigan Consumer Protection Act, MCL 445.901 et seq., MSA 19.418(1) et seq., gives ten (10) days notice to DOUBLECLICK, before filing a lawsuit under the Act.

Before suit is filed, DOUBLECLICK will have an opportunity to confer with the Attorney General, or her designated representatives, regarding its intention to cease and desist from engaging in certain unfair, unconscionable or deceptive methods, acts, and practices in the conduct of trade or commerce and to provide remedies for its past conduct.

I. ALLEGATIONS

1. DOUBLECLICK, INC. is a Delaware corporation whose principal office is in New York. DOUBLECLICK maintains an office in Detroit, Michigan. DOUBLECLICK owns or controls the content of various web sites, including www.doubleclick.net, www.abacusonline.com, www.NetDeals.com, and www.IAF.net.

2. DOUBLECLICK is in the business of collecting, analyzing, and compiling information about consumers and their behavior both online and

offline. DOUBLECLICK operates the Web's largest online advertising and profiling network, consisting of over 1,500 web publishers, and is the market leader in the delivery of banner advertising on the Internet.

3. DOUBLECLICK has organized an alliance of Web sites called the DoubleClick Network. DOUBLECLICK describes its network in the following terms:

The DoubleClick Network is our flagship product, the first network on the Web that set the standard for the network model of advertising on the Internet. The DoubleClick Network is a collection of the most highly trafficked and branded sites on the Web (AltaVista, Dilbert, Macromedia and over 750 more). This Network of sites is coupled with our proprietary DART targeting technology *that allows advertisers to target their best prospects based on the most precise profiling criteria available*. DoubleClick then places your ad in front of your best prospects.

http://www.doubleclick.net:8080/company_info/press_kit/ (Accessed on 2/13/00, emphasis added.)

4. Through the web sites of members of its network using its "DART" targeting and profiling technology, DOUBLECLICK delivers more than 30 billion banner advertisements per month for a variety of clients to Internet users visiting sites other than DOUBLECLICK's. In December 1999 alone, DOUBLECLICK delivered approximately 30 billion ads, or approximately 1 billion ads per day through an alliance of 1800 of the most prominent Web publishers and over 11,000 sites worldwide. Many of the billions of ads generated by DOUBLECLICK are delivered to users in Michigan.

http://www.doubleclick.net/company_info/press_kit/pr.00.02.10.htm (Accessed 2/13/00)

5. In the course of delivering banner ads to users in Michigan who are visiting sites that are members of DOUBLECLICK's network, DOUBLECLICK places cookies directly on the hard disks of users' computers. The type of cookie DOUBLECLICK places can be called "covert cookie" or a "surveillance cookie." DOUBLECLICK's surveillance cookies contain identifying information that enables the company to track Michigan consumers' browsing behavior on the Internet. This tracking includes the sites and individual pages a user visits on affiliated web sites. The information obtained by DOUBLECLICK may also consist of more detailed personal or transactional information that Michigan consumers are unaware is being sent to DOUBLECLICK. Consumers receive DOUBLECLICK's surveillance cookies even if they do not click on the banner ad that DOUBLECLICK has presented.

6. By compiling a record of all web sites visited by Michigan consumers, DOUBLECLICK has been able to create detailed profiles of individual consumers and their behavior on the Internet. DOUBLECLICK has amassed 80 to 100 million detailed individual profiles. This information is used to target consumers with

selected banner advertisements and allows DOUBLECLICK to command higher prices for its advertising services.

7. DOUBLECLICK's placement of cookies is clandestine. DOUBLECLICK knows that most consumers, including Michigan consumers, have no idea that DOUBLECLICK has placed its surveillance cookies on their computers, because such placement is not disclosed by DOUBLECLICK or by the owner of the site on which DOUBLECLICK's ad appears. Furthermore, DOUBLECLICK knows that consumers, including Michigan consumers, have not knowingly and affirmatively consented to the placement of cookies by DOUBLECLICK while they are viewing another site. Nevertheless, DOUBLECLICK has intruded upon users' computers and covertly recorded and retrieved valuable personal and confidential information regarding users' browsing activities.

8. Among those Michigan consumers who expect cookies to be placed by the site they have chosen to visit, many do not know that surveillance cookies are being placed by DOUBLECLICK, a third party with whom users are not acquainted and have not chosen to establish an online relationship.

9. In November, 1999, DOUBLECLICK merged with Abacus, Inc., a company that maintained colossal databases profiling the buying behavior of approximately 90% of American households, including Michigan consumers. Abacus' databases are derived from consumers' purchasing information supplied by mail order companies.

10. DOUBLECLICK has described the Abacus Alliance as follows:

The Abacus Alliance, a cooperative membership database, contains records from more than 1,100 merchandise catalogs, with more than 2 billion consumer transactions from virtually all U.S. consumer catalog buying households.

<http://www.abacusonline.com/> (Accessed 2/16/00)

11. DoubleClick now represents to its clients that it can select consumers based on the consumers' geographic location:

The Power of Targeting the Individual, Not the Content

Send your message to consumers based on where they live or access the Web.

- By targeting based on exact location, you distinguish residents from tourists and segment messages for advertisers accordingly.
- Targeting by geography and user-defined content category enables you to reach a local audience with interests specifically attuned to your particular product or service.

- Geographic targeting offers the versatility to target by city, state or region.

<http://www.doubleclick.net:8080/advertisers/network/local/> (Accessed on 2/13/00).

12. In describing the potential uses of its new collection of consumer profiles databases, DOUBLECLICK states:

Our innovative database list and research solutions combine:

- Comprehensive data from Internet clickstream, online transactions and consumer transactional information from the Abacus Alliance database which is statistically analyzed to predict the most responsive customers;
- Internet media (banner ads and e-mail) and
- Technology (using our DART system for pinpoint delivery and tracking) to deliver the right message to the right customer at the right time.

The Abacus Online Alliance is a confidential membership group of online marketers and publishers, who contribute their registered customer data to a cooperative database managed by Abacus Online, in exchange for access to our exclusive products and services.

This cooperative approach, pioneered by Abacus Direct, revolutionized the consumer catalog industry and created the most comprehensive buyer database nationwide, an unparalleled resource for customer information. Abacus Online applies the same approach to the online world to realize the promise of one to one marketing online.

When you join as an Online Alliance Member, you get access to cost-effective list services and research for targeted advertising campaigns to:

- Generate Responsive New Customers through our Prospecting services
- Rank and Qualify Existing Customers with our Housefile services
- Identify Customer Trends & Behaviors to compete more effectively using our Marketing Insight Research reports.

<http://www.doubleclick.net:8080/advertisers/abacus/> (Accessed 2/13/00, emphasis added).

13. Since 1997, DOUBLECLICK has posted at least four different versions of its "privacy policy" at www.doubleclick.net. These policies are not presented to

users on the pages containing DOUBLECLICK's banner ads.

14. DOUBLECLICK's current privacy policy provides, in part:

[A]s described in "Abacus Alliance" and "Information Collected by DoubleClick's Web Sites" below, *non-personally identifiable information collected by DoubleClick in the course of ad delivery can be associated with a user's personally identifiable information if that user has agreed to receive personally-tailored ads.*

In addition, in connection solely with the delivery of ads via DoubleClick's DART technology to one particular Web publisher's Web site, *DoubleClick combines the non-personally-identifiable data collected by DoubleClick from a user's computer with the log-in name and demographic data about users collected by the Web publisher and furnished to DoubleClick for the purpose of ad targeting on the Web publisher's Web site. DoubleClick has requested that this information be disclosed on the Web site's privacy statement*

* * *

Abacus Alliance

On November 23, 1999, DoubleClick Inc. completed its merger with Abacus Direct Corporation. Abacus, now a division of DoubleClick, will continue to operate Abacus Direct, the direct mail element of the Abacus Alliance. In addition, Abacus has begun building Abacus Online, the Internet element of the Abacus Alliance.

The Abacus Online portion of the Abacus Alliance will enable U.S. consumers on the Internet to receive advertising messages tailored to their individual interests. As with all DoubleClick products and services, Abacus Online is fully committed to offering online consumers notice about the collection and use of personal information about them, and the choice not to participate. *Abacus Online will maintain a database consisting of personally-identifiable information about those Internet users who have received notice that their personal information will be used for online marketing purposes and associated with information about them available from other sources, and who have been offered the choice not to receive these tailored messages. The notice and opportunity to choose will appear on those Web sites that contribute user information to the Abacus Alliance, usually when the user is given the opportunity to provide personally identifiable information (e.g., on a user registration page, or on an order form).*

Abacus, on behalf of Internet retailers and advertisers, will use statistical modeling techniques to identify those online consumers in the Abacus Online database who would most likely be interested in a particular product or service. All advertising messages delivered to

online consumers identified by Abacus Online will be delivered by DoubleClick's patented DART technology.

Strict efforts will be made to ensure that all information in the Abacus Online database is collected in a manner that gives users clear notice and choice. Personally-identifiable information in the Abacus Online database will not be sold or disclosed to any merchant, advertiser or Web publisher.

Name and address information volunteered by a user on an Abacus Alliance Web site is associated by Abacus through the use of a match code and the DoubleClick cookie with other information about that individual. *Information in the Abacus Online database includes the user's name, address, retail, catalog and online purchase history, and demographic data. The database also includes the user's non-personally-identifiable information collected by Web sites and other businesses with which DoubleClick does business. Unless specifically disclosed to the contrary in a Web site's privacy policy, most non-personally-identifiable information collected by DoubleClick from Web sites on the DoubleClick Network is included in the Abacus Online database. However, the Abacus Online database will not associate any personally-identifiable medical, financial, or sexual preference information with an individual. Neither will it associate information from children.*

http://www.doubleclick.net:8080/privacy_policy (Accessed 2/13/00, emphasis added).

15. DOUBLECLICK, in its current privacy policy, represents that sites it controls will give consumers "meaningful notice and choice" about the way DOUBLECLICK will use their personal information:

Information Collected by DoubleClick's Web Sites

The Web sites owned or controlled by DoubleClick, such as www.NetDeals.com and www.IAF.net may ask for and collect personally-identifiable information. DoubleClick is committed to providing meaningful notice and choice to users before any personally-identifiable information is submitted to us. *Specifically, users will be informed about how DoubleClick may use such information, including whether it will be shared with marketing partners or combined with other information available to us. In most cases, the information provided by a user will be contributed to the Abacus Online database to enable personally-tailored ad delivery online. Users will always be offered the choice not to provide personally-identifiable information or to have it shared with others.*

* * *

If you have chosen on any of the Web sites with which Abacus does business to receive ads tailored to you personally as part of Abacus Online's services, the cookie will allow DoubleClick and Abacus Online to recognize you online in order to deliver you a relevant message.

http://www.doubleclick.net:8080/privacy_policy (Accessed 2/13/00, emphasis added)

16. DOUBLECLICK in its current privacy policy asserts that it provides consumers with "notice" and the "choice" to "opt-out" of being subjected to DOUBLECLICK's placement of surveillance cookies. But most consumers are unaware of DOUBLECLICK's practice of placing surveillance cookies on their computers, because they have not received notice, on the site they are visiting, of DOUBLECLICK's existence, therefore, they have reason to visit DOUBLECLICK's site to view its privacy policy. In reality, most consumers have not been given notice, have not knowingly consented to or authorized the placement of surveillance cookies, and are unaware of DOUBLECLICK's opt-out policy.

17. DOUBLECLICK's privacy policy has been a moving target. In prior versions of the privacy policy, DOUBLECLICK promised anonymity to consumers who received impressions of DOUBLECLICK's banner ads. In those earlier versions, DOUBLECLICK never advised consumers that the policy was subject to change without notice. Following its decision to merge with Abacus, Inc, however, DOUBLECLICK, without notice to consumers, jettisoned its commitment to anonymity.

18. Contrary to the representations in DOUBLECLICK's privacy policy, Michigan consumers who visit *www.iaf.net* (the "Internet Address Finder") are not informed how DOUBLECLICK will use consumers' personal information.

19. Consumers visiting *www.iaf.net* who click on a prominently-displayed graphic stating, "click here to SIGN UP with iaf.net!" are electronically transported to *http://www.iaf.net/noframes/add.htm*, a web page entitled "IAF Quick Registration." There, the consumer is prompted on an electronic form to submit a variety of personal information, including name, address, zip code, primary email address, age, gender, and occupation. The consumer then clicks a button at the bottom of the form labeled "Submit, " and the data is transmitted and included in the Internet Address Finder. This is done without the consumer having received notice or any opportunity to consent to DOUBLECLICK's use of the information, including whether it is shared with marketing partners or included in the Abacus Online database.

20. As set forth in Section III, below, the Michigan Consumer Protection Act protects consumers against unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce.

21. DOUBLECLICK's "opt-out" method is an inadequate and unacceptable

substitute for a consumer's knowing consent to allow DOUBLECLICK to collect, compile, analyze, and use confidential, personal information. DOUBLECLICK's opt-out alternative violates the Michigan Consumer Protection Act.

22. DOUBLECLICK's posting of policy changes on its web site is not a substitute for informing consumers of material changes in its use of the personal information that it continues to collect. DOUBLECLICK's unforeshadowed abandonment of its former privacy policies that promised anonymity to recipients of its banner ads, without notice to consumers who relied on such promises, violates the Michigan Consumer Protection Act.

23. DOUBLECLICK's placement of surveillance cookies on the computers of Michigan consumers, without their knowledge, consent, or authorization, violates the Michigan Consumer Protection Act.

24. DOUBLECLICK's promise in its privacy policy that consumers would receive meaningful notice and choice before submitting personal information at www.iaf.net and www.NetDeals.com is a false and misleading statement that violates the Michigan Consumer Protection Act.

25. DOUBLECLICK's failures to disclose the intended use of the personal information it gathers from consumers at www.iaf.net and to obtain the consumer's knowing consent before collecting the information violate the Michigan Consumer Protection Act.

26. State and federal law recognize the importance of a person's privacy. First, the common law protects consumers' privacy in various ways:

Consumers enjoy a common law right to privacy that protects them from offensive intrusions upon their seclusion and private affairs. Consumers who have not affirmatively consented to share information with DOUBLECLICK while visiting a site hosted by another party have not voluntarily disclosed the information that DOUBLECLICK collects.

Consumers enjoy a privacy right not to have their names, likenesses, identities, and personal information misappropriated for commercial advantage. DOUBLECLICK has covertly collected, compiled, and used consumers' personal information for its commercial benefit without proper disclosure and consent.

Consumers enjoy a protected property interest in their valuable personal information. DOUBLECLICK's extensive, sophisticated compilation of consumer profiles and its contractual relationships with members of the Abacus Alliance and with advertisers attests to the value of this information.

Consumers enjoy a right to be free from trespasses to their chattels. Many consumers are not aware of, and do not consent to, DOUBLECLICK's placement of "cookie" files on their hard drives. Such placement is therefore unauthorized.

Consumers are protected under the doctrine of promissory estoppel from breaches of promises made to them by businesses when the consumers detrimentally rely upon those promises. DOUBLECLICK unilaterally changed its privacy policy vis-a-vis consumers who reviewed and justifiably relied on DOUBLECLICK's former promises of anonymity.

27. State and federal statutory law also protects consumers' privacy.

Consumers are protected by the Michigan Fraudulent Access to Computers Act, MCL 752.791, et seq., from the unauthorized access of their computers and computer systems for the purpose of altering or acquiring property or otherwise using the service of a computer.

Consumers are protected under the federal Electronic Communications Privacy Act, 18 USC 2510 et seq., 2701 et seq., against both the unauthorized interception of electronic communications and the unauthorized access of stored communications.

Consumers are protected under the federal Computer Fraud and Abuse Act, 18 USC 1030, from unauthorized intrusions upon consumers' protected computers used in interstate commerce and from the unauthorized collection of valuable information that is stored in such computers.

Children and their parents are protected under the Children's Online Privacy Protection Act, 15 USC 6501 et seq., from disclosure of children's information collected online.

Consumers are also protected by other federal laws from the unauthorized disclosure of their personal information. Other types of information protected by federal law include financial information, telecommunications subscriber information, video rental records and driver's license information.

II. FURTHER DISCUSSION OF COOKIES AND BANNER ADVERTISEMENTS

In the course of delivering over 30 billion banner advertisements per month, DOUBLECLICK causes such ads to be presented to Michigan consumers while they are browsing WorldWideWeb sites other than DOUBLECLICK's. When a Michigan consumer accesses a web page carrying one of DOUBLECLICK's banner ad, DOUBLECLICK covertly causes a "cookie" -- a small text file -- to be written on the

consumer's hard drive, even if the consumer does not click on the banner ad with which the cookie is associated. This cookie does not originate from the server of the web site the consumer is visiting, but rather from DOUBLECLICK. DOUBLECLICK's cookies contain unique identifying numbers. When DOUBLECLICK places a new cookie on a Michigan consumer's hard drive, DOUBLECLICK can read existing cookies that it previously placed. In this way, DOUBLECLICK, without the knowledge or consent of the consumer, monitors the movements of Michigan consumers about the Web to create profiles of users.

DOUBLECLICK is able to associate information obtained from Michigan consumers' browsing behavior with personally-identifiable information available to DOUBLECLICK through its merger with Abacus Direct, Inc., a company that has compiled databases of the purchasing habits of millions upon millions of Americans, including Michigan consumers. DOUBLECLICK has other sources of personally-identifiable information in addition to the Abacus databases, including information obtained from consumers who visit *www.IAF.net*.

Most Michigan consumers do not know that a clandestine third-party implants surveillance cookies on their hard drives, and they are not aware what DOUBLECLICK does with the information it obtains. DOUBLECLICK does not disclose to consumers visiting affiliated web sites in DOUBLECLICK's Network that cookies are being set by a third party -- a third party with whom consumers have not intentionally chosen to interact. Neither DOUBLECLICK's stealthy placement of cookies, nor its use of that information to compile profiles for its commercial advantage, is authorized by most Michigan consumers.

The placement of cookies *per se* is not illegal under Michigan law. Some cookies are set with the user's knowledge and permission. Moreover, cookies are not always used to track a consumer's movements from site to site. For example, some cookies are placed by the site the consumer is visiting and merely count the number of times the consumer has visited the site, or they record the consumer's preferences (such as the categories of information the consumer wishes to view when arriving at a site). Cookies can also help an Internet retailer keep track of a consumer's electronic "shopping cart" before completing a purchase.

The covert placement of a "surveillance cookie" on a consumer's hard drive by DOUBLECLICK is neither apparent to nor authorized by most Michigan consumers. It is the consumer's lack of knowledge and consent to an invisible third-party implanting electronic files and subsequently using that information without the consumer's knowledge or consent, however, that makes DOUBLECLICK's particular practices unlawful.

III. VIOLATIONS OF THE MICHIGAN CONSUMER PROTECTION ACT

Section 2(d) of the Michigan Consumer Protection Act provides, in part:

"Trade or commerce" means the conduct of a business providing goods,

property, or service primarily for personal, family, or household purposes and includes the advertising, solicitation, offering for sale or rent, sale, lease, or distribution of a service or property, tangible or intangible, real, personal, or mixed, or any other article, or a business opportunity.

Section 3(1) of the Michigan Consumer Protection Act, MCL 445.903(1) defines unfair, unconscionable, or deceptive methods, acts or practices in the conduct of trade or commerce as follows:

(m) Causing a probability of confusion or of misunderstanding as to the legal rights, obligations, or remedies of a party to a transaction.

* * *

(s) Failing to reveal a material fact, the omission of which tends to mislead or deceive the consumer, and which fact could not reasonably be known by the consumer.

(t) Entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it.

* * *

(bb) Making a representation of fact or statement of fact material to the transaction such that a person reasonably believes the represented or suggested state of affairs to be other than it actually is.

(cc) Failing to reveal facts that are material to the transaction in light of representations of fact made in a positive manner.

IV. AUTHORITY OF THE ATTORNEY GENERAL

Section 5 of the Michigan Consumer Protection Act provides, in part:

When the attorney general has probable cause to believe that a person has engaged, is engaging, or is about to engage in a method, act, or practice which is unlawful pursuant to section 3, and upon notice given in accordance with this section, the attorney general may bring an action in accordance with principles of equity to restrain the defendant by temporary or permanent injunction from engaging in the method, act, or practice. The action may be brought in the circuit court of the county where the defendant is established or conducts business or, if the defendant is not established in this state, in the circuit court of

Ingham county. The court may award costs to the prevailing party. For persistent and knowing violation of section 3 the court may assess the defendant a civil penalty of not more than \$25,000.00.

Unless waived by the court on good cause shown not less than 10 days before the commencement of an action under this section the attorney general shall notify the person of his intended action and give the person an opportunity to cease and desist from the alleged unlawful method, act, or practice or to confer with the attorney general in person, by counsel, or by other representative as to the proposed action before the proposed filing date. The notice may be given the person by mail, postage prepaid, to his usual place of business or, if the person does not have a usual place of business, to his last known address, or, with respect to a corporation, only to a resident agent who is designated to receive service of process or to an officer of the corporation.

V. DOUBLECLICK'S OPPORTUNITY TO COMPLY WITH MICHIGAN LAW

Within ten (10) days after receiving this Notice, DOUBLECLICK, has the opportunity to cease and desist the alleged unlawful methods, acts or practices, and to agree to remedy harm caused by its past practices, prior to commencement of a legal action. If DOUBLECLICK, elects to cease and desist, that fact will be taken into consideration by this office in determining whether to file a lawsuit.

Whether or not DOUBLECLICK, agrees to cease and desist the alleged unlawful practices, within ten (10) days after receiving this Notice, DOUBLECLICK, may request an opportunity to confer with a representative of the Attorney General in person, by counsel or by other representative as to the proposed lawsuit before it is filed.

Instead of filing a lawsuit against DOUBLECLICK, the Attorney General may accept a formal assurance in accordance with section 6(1) of the Michigan Consumer Protection Act, that the alleged unlawful practices will be discontinued and that corrective action will be taken. Section 6(1) provides:

When the attorney general has authority to institute an action or proceeding pursuant to section 5, he may accept an assurance of discontinuance of a method, act, or practice which is alleged to be unlawful under section 3 from the person who is alleged to have engaged, be engaging, or be about to engage in the method, act, or practice. The assurance shall not constitute an admission of guilt nor be introduced in any other proceeding. The assurance may include a stipulation for any or all of the following:

- The voluntary payment by the person for the costs of investigation.
- An amount to be held in escrow pending the outcome of an action.
- An amount for restitution to an aggrieved person.

VI. CONSEQUENCES OF DOUBLECLICK'S VIOLATIONS

After DOUBLECLICK has been provided with an opportunity to confer, and unless an Assurance of Discontinuance is accepted, or it is determined that there is no cause for action, the Attorney General may file a lawsuit against DOUBLECLICK in Circuit Court as provided in section 5(1) of the Michigan Consumer Protection Act. A lawsuit under this act may result in the issuance of an Injunction, the imposition of a civil penalty of up to \$25,000.00 for persistent and knowing violations of the Act, and other relief ordered by the court.

The Attorney General may also bring a class action on behalf of persons residing in or injured in this state as provided in section 10 of the Act.

If DOUBLECLICK decides to exercise its opportunity to confer before the lawsuit is filed, it must contact the undersigned Assistant Attorney General within ten (10) days after receiving this Notice to avoid the institution of legal action in Circuit Court.

JENNIFER M. GRANHOLM
Attorney General

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Dated: February 17, 2000